Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hii Chang Pee)

COURT OF APPEAL — CIVIL APPEAL NO Q-02–12 OF 2008
ZALEHA ZAHARI, RAMLY ALI AND KANG HWEE GEE JJCA
3 NOVEMBER 2010

Civil Procedure — Limitation of action — Claim for recovery of monies paid — Suit filed within three years from date cause of action arose — Whether claim time barred — Limitation Ordinance of Sarawak Schedule item 78

Civil Procedure — Parties — Proper plaintiffs — Claim for recovery of monies paid — Whether monies given by plaintiff or his company — Separate legal entity of companies

Equity — Equitable remedies and reliefs — Set off — Nature of set off — Claim for recovery of monies paid to defendant — Whether defendant permitted to plead set off against monies owed to his company

Limitation — Statute of limitation — Sarawak Limitation Ordinance — Whether claim for recovery of monies paid time barred — Limitation Ordinance of Sarawak Schedule item 78

The plaintiff and defendant were loggers and business associates. The plaintiff operated his business mainly through his company Interhill Enterprise Sdn Bhd ('Interhill') of which he was a director. Sometime in June 1991 the defendant agreed to obtain a logging contract for the plaintiff. The plaintiff paid the sum of RM8.5m in cash as brokerage to the defendant on condition that the same would be returned to the plaintiff in the event that the defendant failed to obtain the contract. The defendant failed to obtain the contract but did not return the sum of RM8.5m. The plaintiff then through Interhill filed a suit ('the Miri Suit') against the defendant. The Miri Suit was however later withdrawn. The plaintiff filed the instant action in his personal capacity claiming for the return of the sum of RM8.5m. The High Court found for the plaintiff and hence this appeal. The following grounds were raised in this appeal: (i) that the plaintiff's action was statute barred under s 3 of the Limitation Ordinance (Cap 49 of Sarawak); (ii) that the action was an abuse of the process of the court given that a suit on the same factual matrix had been instituted in the name of Interhill. The previous action was still active before

the High Court when the present action was filed; (iii) that the sum claimed was in fact advanced to the defendant by Interhill; and (iv) that the sum of RM8.5m claimed by the plaintiff had been set off against debts owed to the defendant by the plaintiff through a series of transactions in the course of their logging business.

Held, dismissing the appeal with costs:

(1) The suit was filed on 22 October 1998 well within the limitation period of three years from the date of the defendant's letter dated 22 December 1995 as set in item 78 of Schedule to the Limitation Ordinance of Sarawak (see para 8).

(2) An incorporated company has a personality separate and distinct from its members. There could therefore be no question of the plaintiff in the instant suit instituting two suits on the same claim. It did no harm to the defendant as he would be at liberty to raise a defence (as he did) in this suit that the money was advanced to him by Interhill and not by the plaintiff (see para 9).

(3) There was compelling evidence that the plaintiff had made the advance for himself and not for and on behalf of his company or companies (see para 13).

(4) A set-off is essentially a claim by a defendant that the plaintiff had owed him money which should be subtracted from the debt being claimed by plaintiff as at the date of the filing of the suit when the mutual debts would have to be squared up. But as a company has a personality separate and distinct from its shareholders, the defendant could not set off the debt owed to his company against the debt owed by him in his personal capacity (see paras 20–21).

(5) To sustain his claim that the custom practised among the logging business community to which they both belonged allowed him to set off his personal debt against debt owed to his company the defendant had to prove that the custom was 'notorious, certain and reasonable and does not offend against the intention of any legislative enactment'. The plaintiff offered no such evidence of the existence of such a custom or practice and understandings (see paras 22 & 24).

[Bahasa Malaysia summary

Plaintif dan defendan adalah pembalak-pembalak dan rakan niaga. Plaintif menjalankan perniagaannya melalui syarikatnya Interhill Enterprise Sdn Bhd ('Interhill') yang mana dia adalah pengarah. Pada sekitar Jun 1991 defendan bersetuju untuk mendapatkan kontrak pembalakan untuk plaintif. Plaintif membayar wang tunai sejumlah RM8.5 juta sebagai pembrokeran kepada defendan dengan syarat bahawa ianya akan dikembalikan kepada plaintif jika

defendan gagal untuk mendapatkan kontrak tersebut. Defendan gagal untuk mendapatkan kontrak tersebut tetapi tidak memulangkan wang RM8.5 juta tersebut. Plaintif kemudiannya melalui Interhill memfailkan tindakan ('Guaman Miri') terhadap defendan. Guaman Miri walau bagaimanapun kemudiannya ditarikbalik. Plaintif memfailkan tindakan ini dalam kapasiti peribadinya menuntut pemulangan wang RM8.5 juta tersebut. Mahkamah Tinggi memihak plaintif dan maka rayuan ini. Alasan-alasan berikut dibangkitkan dalam rayuan ini: (i) bahawa tindakan plaintif adalah dihalang statut di bawah s 3 Ordinan Hadmasa (Cap 49 Sarawak) (Ordinan); (ii) bahawa tindakan adalah penyalahgunaan proses mahkamah di mana tindakan atas matriks fakta yang sama telah dimulakan di dalam nama Interhill. Tindakan terdahulu masih aktif di hadapan Mahkamah Tinggi apabila tindakan ini difailkan; (iii) bahawa jumlah yang dituntut sebenarnya pendahuluan kepada defendan oleh Interhill; dan (iv) jumlah RM8.5 juta tersebut yang dituntut oleh plaintif telah set off dengan hutang yang kena dibayar kepada defendan oleh plaintif melalui beberapa transaksi berturut-turut dalam pelaksanaan perniagaan pembalakan mereka.

Diputuskan, menolak rayuan dengan kos:

(1) Tindakan difailkan pada 22 Oktober 1998 tepat dalam masa tempoh had masa tiga tahun dari tarikh surat defendan bertarikh 22 Disember 1995 seperti yang ditetapkan dalam item 78 Jadual kepada Ordinan (lihat perenggan 8).

(2) Syarikat yang diperbadankan mempunyai personaliti berasingan dan berbeza daripada ahli-ahlinya. Oleh itu tidak terdapat soalan plaintif dalam tindakan ini memulakan dua tindakan atas tuntutan yang sama. Ia tidak memudaratkan defendan kerana dia bebas untuk membangkitkan pembelaan (seperti yang dilakukannya) dalam tindakan ini bahawa wang telah didahulukan kepadanya oleh Interhill dan bukan plaintif (lihat perenggan 9).

(3) Terdapat keterangan mendorong bahawa plaintif telah membuat pendahuluan untuk dirinya dan bukan untuk dan bagi pihak syarikat atau syarikat-syarikat (lihat perenggan 13).

(4) Set-off adalah pada dasarnya tuntutan oleh defendan bahawa plaintif berhutang wang dengannya yang mana patut ditolak daripada hutang yang dituntut oleh plaintif pada tarikh pemfailan tindakan apabila hutang-hutang bersama patut dibahagi sama rata. Tetapi memandangkan syarikat mempunyai personaliti berasingan dan berbeza daripada pemegang-pemegang sahamnya, defendan tidak dapat set-off hutang yang kena dibayar kepada syarikatnya terhadap hutang yang kena dibayar olehnya dalam kapasiti peribadi (lihat perenggan 20–21).

(5) Untuk mengekalkan tuntutannya bahawa adat yang diamalkan di antara

komuniti perniagaan pembalakan yang mana kedua-dua adalah ahli, membenarkan dia untuk set off hutang peribadinya terhadap hutang yang kena dibayar kepada syarikatnya, defendan mesti membuktikan bahawa adat adalah 'notorious, certain and reasonable and does not offend against the intention of any legislative enactment'. Plaintif tidak mengemukakan keterangan mengenai wujudnya adat atau amalan dan pemahaman sedemikian (lihat perenggan 22 & 24).]

Notes

For a case on Sarawak Limitation Ordinance, see 9 *Mallal's Digest* (4th Ed 2010 Reissue) para 2432.

For cases on limitation of action in general, see 2(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 5255–5182.

For cases on proper plaintiffs, see 2(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 5720–5722.

For cases on set-off, see 6 *Mallal's Digest* (4th Ed 2010 Reissue) paras 2800–2802.

Cases referred to

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62; [1997] 3 CLJ 17, CA (refd)

Chan Cheng Kum & Anor v Wah Tat Bank Ltd & Anor [1971] 1 MLJ 177, PC (refd)

Devonald v Rosser & Sons [1906] 2 KB 728, CA (refd)

Legislation referred to

Evidence Act 1950 s 34

Limitation Ordinance (Cap 49 of Sarawak) s 3

Rules of the High Court 1980 O14

Appeal from: Suit No 22–139 of 1998(MR) (High Court, Miri)

Muhammad Shafee Abdullah (Bong Ah Loi and Victor Wong Lit Fah with him) (Suhaili & Bong Advocates) for the appellant.

Lim Heng Choo (Lim & Lim Advocates) for the respondent.

Kwang Hwee Gee JCA (delivering judgment of the court):

[1] The plaintiff's claim against the defendant is for the return of the sum of RM8.5m which he paid to the defendant as fees to secure for him a logging contract in a logging concession of some 40,000 acres at an area adjacent to the Lanjak Entimau Timber Concession Area in Sarawak.

[2] The High Court at Miri found for the plaintiff and hence this appeal.

[3] The plaintiff and the defendant were loggers and were business associates. Their relationship dated back to the 1970s when the plaintiff started to purchase logs from the defendant. The plaintiff operated his business mainly through his company Interhill Enterprise Sdn Bhd of which he was a director; and the defendant through his companies Equatorial Timber Marketing Sdn Bhd and Equatorial Timber Holdings Sdn Bhd.

[4] It is not in dispute that sometime in June 1991 the plaintiff had met the defendant in Singapore when the defendant agreed to obtain a logging contract for the plaintiff to log in a concession of some 40,000 acres at an area adjacent to the Lanjak Entimau Timber Concession Area in Sarawak. The plaintiff had paid the sum of RM8.5m in cash as brokerage to the defendant on condition that the same would be returned to the plaintiff in the event that the defendant failed to obtain the contract. This is clear from the pleadings itself.

[5] The defendant failed to obtain the contract but did not return the sum of RM8.5m. The plaintiff then in his capacity as director of his family company Interhill Enterprise Sdn Bhd filed Miri Suit No MR-22–18 of 1996 against the defendant, in the course of which Interhill Enterprise Sdn Bhd initiated an application for summary judgment under O 14. The application was still pending before the court when Interhill Enterprise Sdn Bhd withdrew the suit MR-22–18 of 1996 on 20 May 2010.

[6] The plaintiff then decided to file the instant action in his personal capacity.

THE GROUNDS

[7] The four grounds raised at the High Court below were raised before us in this appeal:

(a) first — that the plaintiff's action was statute barred under s 3 of the Limitation Ordinance (Cap 49 of Sarawak) the claim having been instituted outside the period of limitation provided therein;

(b) second — that the present action is an abuse of the process of the court given that a suit on the same factual matrix had been instituted in the name of Interhill Enterprise Sdn Bhd, a company of which the plaintiff was the director, against the defendant at the court. The previous action was still active before the High Court when the present action was filed.

(c) third — that the sum claimed was in fact advanced to the defendant by Interhill Enterprise Sdn Bhd whose legal existence was independent and

separate from its officers, directors, and shareholders. The evidence it is submitted, points conclusively to the fact that the money was paid to the defendant by the plaintiff for and on behalf of his company Interhill Enterprise Sdn Bhd and under the circumstances only Interhill Enterprise Sdn Bhd can make a claim and not the plaintiff in his individual capacity.

(d) fourth — that the sum of RM8.5m claimed by the plaintiff had been set off against debts owed to the defendant by the plaintiff through a series of transactions in the course of their logging business in accordance with the understandings and practice among members of the logging business community to which they both belonged. The practice and understandings in so far as it can be understood from the evidence of the defendant, allow them to mix their personal business dealings with dealings of companies which they owned with the liberty to set off personal debts against debts owed to their companies. The defendant claimed that the plaintiff's claim of RM8.5m had been set off in this manner by:

(a) Payment on the 11 April 1994	RM3,000,000
(b) Debit note ETM/DN/94–266	RM1,400,000
(c) Debit note for monthly log produce for timber area held under Timber Licence No T/0329, No T/0339 and No T/0340 from March 1994 to December 1994	RM5,752,665.82
	RM10,165,655.82 (sic)

The first ground — on limitation

[8] This was not seriously pursued as it was abundantly clear that the present suit was filed on 22 October 1998 well within the limitation period of three years from the date of the defendant's letter dated 22 December 1995 as set in item 78 of Schedule to the Limitation Ordinance of Sarawak.

The second ground — whether there was an abuse of process

[9] Whereas the Miri High Court Suit No MR-22–18 of 1996 was filed by Interhill Enterprise Sdn Bhd, the instant suit was by the plaintiff Hu Chang Pee in his personal capacity. An incorporated company has a personality separate and distinct from its members. There could therefore be no question of the plaintiff Hu Chang Pee in the instant suit instituting two suits on the same claim. At worst, the instant suit introduced into the arena of conflict another claimant against the defendant for the return of the sum of RM8.5m. It did no harm to the defendant as he would be at liberty to raise a defence (as he did) in this suit that the money was advanced to him by Interhill Enterprise Sdn Bhd and not Hu Chang Pee. The two suits could have been consolidated at the case

management stage, but the parties did not do so.

The third ground — whether the judge fell into error

[10] In the earlier suit filed by Interhill Enterprise Sdn Bhd against the defendant, the plaintiff in his capacity as a director of Interhill Enterprise Sdn Bhd in an O 14 application for summary judgment deposed two affidavits in which he had admitted that the money was in fact advanced by his company Interhill Enterprise Sdn Bhd. It was contended that the learned judge had fallen into error in failing to consider the following evidence in favour of the defence:

(a) at para 5 of his affidavit in support wherein he deposed 'Pursuant to the aforesaid arrangement the Plaintiff (Interhill) duly paid the said sum of Malaysian Ringgit RM8,500,000 to the defendant ('appellant') in staggered payments between 12 August 1991 and 23 September 1991'; and

(b) at para 6 of his affidavit in reply, (in answer to para 2(h) of Ting's supplementary affidavit in opposition) wherein he deposed 'I assert that the RM8.5 million was advanced by the Plaintiff (Interhill) and is owed to the Plaintiff (Interhill)'.

[11] We examined the notes of proceedings of the High Court in the present action. Uppermost in our mind is the established principle alluded to by Gopal Sri Ram JCA (as he then was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17 that:

> ... a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

[12] We also reminded ourselves of the overriding principle that in undertaking the task before him a judge has always been afforded the latitude to arrive at his own findings of fact and that a party complaining of the omission of the judge to consider a point in his favour must be able to convince the appellate court that the omission was so critical that it would have affected the outcome of the litigation.

[13] Having examined the notes of proceedings of the High Court in the

present action, we are convinced that the omission of the learned judge to consider the two paragraphs referred to earlier would not have influenced the outcome of the litigation, for there were other more compelling evidence that the plaintiff had made the advance for himself and not for and on behalf of his company or companies. They were to be found in the letter which the plaintiff wrote to the defendant and the reply he received from the defendant's solicitors.

[14] The plaintiff's letter read as follows:

Our Ref: IE/M/447/95

Date: 6 December 1995

AR REGISTERED

Tan Sri Ting Pek Khiing

Equatorial Timber Marketing Sdn Bhd

No. 1 Jalan Padungan

Bandaraya Kuching Utara

P.O. Box 2939

93758 Kuching.

Dear Tan Sri

RE: SUMS OF MONIES ADVANCED TO YOU

I write in respect of various sums of monies that I have advanced/paid to you over the past few years. Since my oral attempts to speak to you regarding such payments has failed to produce any satisfactory result, I am constrained to write to you.

You will recall, I met you at the Holiday Inn, Singapore in 1991. You informed me that for a fee of RM8.5 Million, you could secure a timber main-contract for my company, in respect of a timber concession of some 40,000 odd acres adjacent to Lanjak Entimau concession.

Pursuant to our conversation and the agreement that we reached, I caused to be paid to you a sum of money in both Malaysian and Singapore currency amounting to RM8.5 Million on the understanding and upon your undertaking that you would return the said money if you failed to secure such a main-contract. No time period was fixed and I appreciate that it can take a very long time to secure such a main-contract. You repeatedly assured me each time I reminded you over the past years that you were still working on it and asked me to wait.

The last time you told me to wait was in last year, 1994. I know that you have been working on obtaining the main-contract since then, as you assured me you were doing so.

However, thinking the matter over, I do not wish to proceed any further with our arrangement. I do not want the main-contract anymore.

Therefore, I will appreciate if you could return the RM8.5 Million to me soonest.

I look forward to hearing from you soon.

Yours faithfully

for INTERHILL ENTERPRISE SDN BHD

[15] The reply from the defendant's solicitors Victor Wong & Chiew dated 22 December 1995 in response to the plaintiff's letter read:

Your Ref: IE/M/447/95 & IE/M/448/95

22nd December, 1995

AR REGISTERED

Mr Hii Chang Pee,

Interhill Enterprise Sendirian Berhad,

Lot 960, Piasau Industrial Area,

Jalan Bulatan,

P.O. Box 1200/1559,

98008 Miri.

Dear Sir,

RE: TAN SRl DATUK TING PEK KHIING

YOUR CLAIM FOR SUMS ADVANCED

TAN SRI'S CLAIM FOR SUMS DUE

We act for and on behalf of Tan Sri Datuk Ting Pek Khiing of Equatorial Timber Marketing Sendirian Berhad, of P.O. Box 2939, 93758 Kuching in respect of the above stated matters.

Your two letters with the above-stated reference dated 6th and 8th December, 1995 respectively and addressed to Tan Sri have been given to us with instructions to reply thereto.

In respect of the RM8.5 million paid by you to Tan Sri on the matter of the timber concession of some 40,000 acres, we are to say that Tan Sri will make refund of the same.

In respect of the Singapore Dollars 3,580,000.00 paid by you on the matter of the transfer of Timber Licence No.T/3157, we are to say with regret that your request for the refund of this sum cannot be entertained.

We are to say that the transfer of the said Timber Licence could not be successfully carried out due to actions on your part amounting to criminal offence directly affecting the said Timber Licence. Your actions were directly and solely the cause of

the cancellation of the said Timber Licence by the relevant authority. You will appreciate that in these circumstances, refund of the Singapore Dollars 3,580,000.00 cannot be made.

The Tan Sri on his part have caused to be paid, credited and/or claimed to and from you the following sums of money:

i. By HHBB cheque No. 217679 KCH	RM3,000,000.00
ii. Debit Note ETM/DN/94-266 of 31/10/1994	RM1,400,000.00
iii. Monthly deduction for log production at areas under T0339, T0340 and T0329 on Account	RM10,012,704.77
Total:	RM10,012,704.77

So in respect of your claim for RM8.5 Million, this amount of RM10,012,704.77 due from you to the Tan Sri will more than settle your claim.

We are to request that you effect settlement of the balance of RM1,512,704.77 as soon as possible.

We are further instructed that you took over the Timber concession under Licence T/0329 on the express undertaking to pay to Tan Sri a sum of RM16 Million. To date, you have paid a total of RM4 Million against this debt, leaving a balance of RM12 Million. We are to request that you make immediate arrangement to settle this outstanding sum of RM12 Million in full.

Please by your prompt reply inform us or the Tan Sri of your arrangement to fully pay and settle the two outstanding sums set out above. We will appreciate your kind assistance in this matter.

Yours faithfully,

VICTOR WONG & CHIEW

Sgd.

VW/cp

c.c. Tan Sri Datuk Ting Pek Khiing

[16] The admission, we observed, was consistent with the statement he made in his affidavit in reply affirmed on 3 December 1996 to oppose the plaintiff's application for summary judgment under O 14 in the Miri Suit No MR-22–18 of 1996 *Interhill Enterprise Sdn Bhd v Tan Sri Datuk Ting Pek Khiing*, at para 4(a) wherein he attempted to counter the plaintiff's claim that the money was advanced by Interhill Enterprise Sdn Bhd by deposing that 'the RM8.5 million was advanced by Hii in Singapore and Malaysian currency and not by the Plaintiff (Interhill) as alleged'.

[17] The learned High Court judge accepted the documents as clear proof that the plaintiff was acting for himself. We accept his reasoning and find no

reason to disagree with his finding on this issue.

The fourth ground — the set-off

[18] The only issue of substance that we need to consider in this appeal in our view, is whether the sum of RM8.5m had been set off against the mutual debts of the parties in the way described by the defendant.

[19] First it is necessary to consider whether the defendant may set off his personal debt against debts owed to his companies.

[20] A set-off is essentially a claim by a defendant that the plaintiff had owed him money which should be subtracted from the debt being claimed by plaintiff as at the date of the filing of the suit when the mutual debts would have to be squared up.

[21] But as a company has a personality separate and distinct from its shareholders, it follows therefore the defendant cannot set off the debt owed to his company against the debt owed by him in his personal capacity.

[22] To sustain his claim that the custom practised among the logging business community to which they both belonged allowed him to set off his personal debt against debt owed to his company the defendant would have to prove that the custom was 'notorious, certain and reasonable and does not offend against the intention of any legislative enactment' (*Devonald v Rosser & Sons* [1906] 2 KB 728, at p 743).

[23] We would adopt what Lord Devlin said in *Chan Cheng Kum & Anor v Wah Tat Bank Ltd & Anor* [1971] 1 MLJ 177 (PC) (Lord Upjohn, Lord Devlin and Lord Pearson) with respect to what is required to be proved to establish the existence of custom of merchants generally:

> Universality, as a requirement of custom, raises not a question of law but a question of fact. There must be proof in the first place that the custom is generally accepted by those who habitually do business in the trade or market concerned. Moreover, the custom must be so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it. The size of the market or the extent of the trade affected is neither here nor there. It does not matter that the custom alleged in this case applies only to part of the shipping trade within the State of Singapore, so long as the part can be ascertained with certainty, as it can here, as the carriage of goods by sea between Sarawak and Singapore. A good and established custom 'obtains the force of a law, and is, in effect, the common law within that place to which it extends': *Lockwood v Wood* (1844) 6 QB 50; 115 ER 19, per Tindal CJ at p 64. Thus the custom in this case, if proved, takes effect as part of the common law of Singapore. As such it will be applied by any court dealing with any

matter which that court treats as governed by the law of Singapore. In this sense it is binding not only in Singapore but on anyone anywhere in the world.

[24] The plaintiff offered no such evidence of the existence of such a custom or practice and understandings.

[25] But even assuming that such a custom or practice and understandings in the logging business community is proved, it is clear that the defendant had failed to prove any such set-offs.

[26] As proof of the set-off all that the defendant did was to produce a stack of over 100 documents consisting of copies of payment vouchers, credit and debit notes accompanied by a summary of payments made by his company Equatorial Timber Marketing Sdn Bhd to the plaintiff's company between June 1995 and February 1998, statement of payments for the purchase of logs by the plaintiff's company Interhill Enterprise Sdn Bhd from the defendant's company Equatorial Timber Marketing Sdn Bhd for 1997 and for January and February 1998.

[27] The documents were disputed by the plaintiff and were therefore at best, self serving documentary hearsay. Even assuming they can be proved to be entries in the books of accounts regularly kept in the course of business of the defendant's companies, under s 34 of the Evidence Act 1950, they were insufficient without more, 'to charge any person with liability'.

[28] For the foregoing reasons we affirm the decision of the High Court and dismiss the appeal with costs.

[29] Both Justice Zaleha Zahari and Justice Ramly bin Hj Ali have read the draft of this judgment and have agreed with the contents therein.

Appeal dismissed with costs.

Reported by Kanesh Sundrum